

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500703

WARREN A. EMERSON, EMPLOYEE	CLAIMANT
GERALD'S AUTOMOTIVE SERVICE, EMPLOYER	RESPONDENT
GUARANTEE INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED DECEMBER 13, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on November 18, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Phillip Wells, Attorney-at-Law, Jonesboro, Arkansas.

Respondent #1 represented by Mr. Paul M. Gehring, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 did not appear at the hearing.

STATEMENT OF THE CASE

A hearing was conducted November 18, 2005, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this claim on October 19, 2005, and a Prehearing Order was filed on said date. Although the Second Injury Fund was joined as a party/respondent, it did not participate in the hearing because claimant's entitlement to permanent disability benefits was reserved. At the hearing, the parties announced that the stipulations and issues remained the same as set out in the Prehearing Order. A copy of the Prehearing Order was introduced as

"Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the Arkansas Workers' Compensation Commission had jurisdiction over this claim; that the employee/employer/carrier relationship existed between the claimant and respondents #1 at all relevant times, including January 6, 2005; that the claimant earned sufficient wages to entitle him to compensation rates of \$397.00 per week for temporary total disability and \$298.00 per week for permanent partial disability; and that respondents #1 had controverted the claim in its entirety for purposes of attorney's fees.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

At the prehearing conference, the claimant contended, that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on January 6, 2005; that respondents #1 paid various medical and related expenses, as well as an initial period of temporary total disability prior to terminating all benefits. The claimant requested that respondents be held responsible for additional medical treatment, including, but not limited to recommended diagnostic testing to determine whether surgery was required which would entitle the claimant to additional temporary total disability, and that a controverted attorney's fee should attach to any additional benefits awarded. The claimant specifically reserved entitlement to permanent disability benefits, if any.

At the hearing, the claimant amended his contentions based upon the evidentiary deposition testimony of Dr. Rebecca Barrett-Tuck to request temporary total disability benefits beginning January 10, 2005, and continuing through the present while maintaining that the claimant's healing period has not yet ended, less credit for the disability benefits previously paid. Respondents pointed out that the claimant was paid temporary total disability benefits on this claim until approximately June 24, 2005, when it elected to controvert compensability, maintaining that the claimant did not sustain a compensable injury within the meaning of the Arkansas Workers' Compensation Laws, and was, therefore, not entitled to any benefits. (Tr.4-6)

In addition to the claimant, Gerald F. Barnett, the owner/employer was called as a witness in his behalf. The record is composed of the transcript of the November 18, 2005, hearing containing a joint medical exhibit consisting of forty-five (45) pages which was introduced as "Joint Exhibit A," together with the evidentiary deposition of Dr. Rebecca Barrett-Tuck which was introduced as "Joint Exhibit B" and retained in the Commission file in bound form.

Subsequent to the hearing, respondents filed a Motion to Supplement the Record with what it purported to be newly discovered evidence and which respondents maintained was relevant to the issue of compensability, and requested that the proffered attachments be considered a part of the record. Because the claimant voiced no objections to the introduction of the additional medical records,

maintaining that the documents were simply cumulative to the medical previously introduced, the exhibits were blue-backed and made a part of the record herein.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the evidence, that he sustained a compensable back injury arising out of and during the course of his employment with Gerald's Automotive Service as the result of a specific incident identifiable in time and place of occurrence on January 6, 2005, as established by medical evidence, supported by objective findings, entitling the claimant to appropriate workers' compensation benefits.
4. The claimant has been temporarily totally disabled beginning January 10, 2005, and continuing through the present and until such time that the claimant's healing period is determined to have ended.

5. The claimant's healing period has not ended as of the date of the within hearing.
6. Respondents are responsible for all hospital, medical, and related expenses as the result of claimant's January 6, 2005, injury, and respondents remain responsible for continued, reasonably necessary medical treatment, including, but not limited to additional diagnostic testing to determine whether surgery is required to treat the claimant's compensable injury.
7. All additional issues, including claimant's entitlement to permanent disability benefits, are specifically reserved.

DISCUSSION

This is an extremely puzzling claim. The reason for my confusion is based upon a complete lack of understanding concerning the reasons that the claim has been disputed. Rather than conduct an exhaustive analysis of the record in this cause, suffice it to say that the evidence overwhelmingly supports compensability of claimant's January 6, 2005, injury. Admittedly, the claimant has the burden of proving compensability of an alleged work-related injury. In the instant claim, both the lay testimony, as well as the medical evidence, clearly and convincingly supports the claim. Admittedly, the record as a whole reflects that the claimant sustained at least two (2) prior low back injuries, the first in 1982 while working for the employer herein, and a second in 1986 which occurred while the claimant was on National Guard duty. However, the record also reflects that the claimant did not

experience any significant, additional back problems between 1987 and January 6, 2005. The claimant worked as a mechanic for the respondent, Gerald F. Barnett, d/b/a Gerald's Automotive Service, for approximately twenty-five (25) years. It is undisputed that the claimant reported a back injury as the result of a specific incident identifiable in time and place of occurrence on January 6, 2005, while changing a tire at the shop. The claimant immediately experienced a sharp pain in his back, as well as right leg numbness which was confirmed by the owner/employer who was working next to the claimant at the time of the incident. The employer, in turn, immediately reported the injury to his workers' compensation carrier. The carrier exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant prompt, reasonably necessary medical treatment, as well as payment of temporary total disability. In fact, the carrier paid appropriate benefits both temporary total disability, as well as medical expenses until approximately June 24, 2005, at which time it elected to controvert the claim in its entirety.

Respondents rely primarily on the medical evidence submitted in this claim, specifically, the medical records of Dr. Braden and the diagnostic films to controvert compensability. As will be set out further below, the medical evidence supports compensability. Subsequent to the hearing, respondents filed a Motion to Supplement the record with newly discovered information. The claimant did not object.

First, I do not find the information to be newly discovered. The claimant candidly acknowledged sustaining prior injuries in 1982 and 1986. Further, the medical evidence proffered, including an August 16, 2005, report from Dr. Terence P. Braden not only supports compensability of this claim, Dr. Braden also recommends additional diagnostic studies, including a discogram which the claimant's primary treating physician, Dr. Rebecca Barrett-Tuck has recommended and which respondents, for unexplained reasons, have continued to controvert. Dr. Braden's August 16, 2005, report addressed to claimant's attorney, is set out in its entirety below:

Dear Mr. Wells:

I am in receipt of your letter dated August 5, 2005 regarding Mr. Warren Emerson.

As you know, Mr. Emerson is a 46-year-old white male that reports to have sustained an injury while at his work employment on January 6, 2005. He reports he was pulling on a tire on a rim and he had sudden onset of low back pain located on his right side. He subsequently saw Dr. Arnold Gilliam who treated him conservatively and he subsequently was referred to me February 2, 2005 for his first visit with me. At that time an examination was performed and a history taken. I also reviewed reports of his scan that were done of his lumbosacral spine. At that time I found that he had multiple levels of degenerative changes in his spine as well as degenerative disc disease based on his reports.

At that time, I injected the soft tissues of his lumbar spine down toward his facet joint to see if we could give him any improvement and he was instructed to call me in the office. He had no distinct improvement from the injection I gave him. I recommended adding aquatic therapy to his physical therapy he was participating in. He continued to have discomfort, I recommended he continue alternate duty and made referral to Dr. Sunil Gera from Pain Management since there was little else that I could offer Mr. Emerson from a physical medicine and rehabilitation standpoint. He then followed back with me on March 29, 2005. He had continued complaints of discomfort and had limited range of motion on testing. The injections that had been done by Dr. Gera, by his report, gave no improvement. I

recommended a myelogram and post-myelogram CT scan of the lumbosacral spine and an EMG nerve conduction of the right lower extremity.

His EMG nerve conduction of the right lower extremity was done by Dr. Chan, which was without any evidence of radiculopathy or abnormality.

His myelogram and post-myelogram CT revealed disc bulges at L4-5 and L5-S1.

My last visit with Mr. Emerson was on April 12, 2005 where I recommended that he continue with Dr. Gera from Pain Management standpoint to see if there was anything he had in his alimentarium to give him relief of his symptoms.

Mr. Emerson reported to me that he has had previous injuries to his lumbosacral spine as he has worked as a mechanic for the last 25 years but each of those had resolved and he was pain free at the time of his reported injury.

I am unable to assign to Mr. Emerson an impairment based on the AMA Guide to Evaluation IV edition since I cannot, within a reasonable degree of medical certainty, give a cause fo his ongoing symptoms nor an anatomical localization. His changes on his scan show degenerative changes of his discs.

As I stated in my dictations, discography or perhaps discogram may be appropriate to see if there is concurrent symptoms or pain that would come from examination of these discs. If there was, then, I can infer, within a reasonable degree of medical certainty, that the discs were the cause of his ongoing symptoms and related to his work injury.

If there is any further information that I can supply, please feel free to contact me directly. (Resp. Supp. Ex., pp.9-10)

Dr. Rebecca Barrett-Tuck, a neurosurgeon, issued a September 21, 2005, report which states:

As you are aware, Warren Emerson suffered an injury while at work on January 6, 2005. MRI has shown a disc protrusion at L4-L5, which I feel to a reasonable degree of medical certainty, is secondary to the injury that he suffered January 6, 2005. I recommended a discogram to determine with any certainty whether this disc is the entire cause of his low back pain and therefore make a decision as to whether or not a fusion might be helpful for him. I do feel that this is medically necessary to enable an appropriate decision as far as the need for further surgery.

(Jt. Ex. A, p.45)

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of employment;
2. proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
3. medical evidence supported by objective medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied. *Mikel vs. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The parties introduced a "Joint Medical Exhibit" consisting of forty-five (45) pages. The medical evidence is clearly supported by objective findings as required by the Act. Specifically, diagnostic studies interpreted by various providers indicate a prominent disc bulge at L4-L5. Further, the claimant's treating physicians have observed significant muscle spasms, bilaterally in the paraspinal muscle in the lumbar area.

In addition to the medical reports, the evidentiary deposition of Dr. Rebecca

Barrett-Tuck was introduced as “Joint Exhibit B” and retained in the Commission file in bound form. Rather than conduct an exhaustive analysis of the deposition, suffice it to say that the deposition supports compensability of this claim, as well as the need for additional diagnostic studies and treatment.

Respondents have controverted this claim in its entirety. I feel compelled to point out that although respondents are entitled to a credit for any temporary total disability previously paid through on or about June 24, 2005, by unilaterally terminating all medical treatment it has effectively frustrated efforts at fully diagnosing and treating the claimant’s injury, thus extending the claimant’s period of temporary total disability through an undetermined date. It is the fervent hope of this administrative law judge that respondents will immediately reinstate temporary total disability, as well as promptly authorize additional medical treatment and diagnostic studies rather than protract the litigation process through appeals of what appears to be a clearly compensable claim.

AWARD

Respondent, Guarantee Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$397.00 per week beginning January 10, 2005, and continuing through the present and until a date yet to be determined.

All accrued benefits shall be paid in lump sum and without discount; however, respondents may claim credit for all temporary total disability previously

paid.

Respondents are further directed and ordered to pay all outstanding medical expenses, and respondents remain responsible for additional medical treatment, including, but not limited to recommended diagnostic testing to determine the nature and extent of claimant's injury, as well as continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. Phillip Well, is hereby awarded the maximum statutory attorney's fee on this entire Award. *Kleek vs. Great S. Metals*, 335 Ark. 342, 354, 981 S.W.2d 529, 530 (1998). The attorney's fees are to be paid pursuant to A.C.A. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge